Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a state waive its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court and then seeks a dispositive ruling?

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, also defendants in the proceedings below were Edwin A. Rugg (personally and in his capacity as Vice-President of Academic Affairs, Kennesaw State University (KSU)), Timothy Mescon (individually and in his capacity as Dean of Coles College of Business at KSU), and Teresa J. Covin (personally and in her capacity as Chair of the Department of Management & Entrepreneurship at KSU). Mr. Mescon was later dismissed without prejudice from the suit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Paul D. Lapides, respectfully prays that a writ of certiorari issue to review the May 24, 2001, opinion and judgment of the U.S. Courts of Appeals for the Eleventh Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, *Lapides v. Board of Regents of the University System of Georgia*, No. 00-14984 (11th Cir. May 24, 2001), is reported at 251 F.3d 1372, and is reprinted at App. 1a. The U.S. District Court's Order of September 8, 2000, is unreported but is reprinted at App. 12a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of May 24, 2001. The Supreme Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition questions whether states waive their Eleventh Amendment immunity when they remove a case from state court to federal court. The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law

or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. Respondents jointly removed a complaint filed in state court to federal court, under the authority of 28 U.S.C. §§ 1441, 1443 & 1446, reprinted in pertinent part at App. 29a-33a.

STATEMENT

1. Petitioner, Paul D. Lapides, is a professor at Kennesaw State University (KSU), part of the State University System of Georgia under its Board of Regents ("Regents"). Aggrieved because of various personnel actions taken against him by KSU administrators, Lapides brought suit in Superior Court of Cobb County, State of Georgia, on March 9, 2000, naming as defendants the Regents and three KSU administrators in both their personal and official capacities. See, *supra*, at (ii). Lapides' complaint sounded in common law tort, but also included an allegation that defendants had violated his constitutional due process rights.

On April 13, 2000, attorneys for the State of Georgia filed two Answers in Cobb County Superior Court, one on behalf of the Regents and the other for the individual defendants. Both Answers asserted as an affirmative defense sovereign immunity and Georgia's Eleventh Amendment immunity.

On the same day, Georgia's lawyers filed a Notice of Removal in the U.S. District Court for the Northern District of Georgia. See App. 34a. The Notice asserted a right of removal under 28 U.S.C. §§ 1441 & 1446, insofar as Georgia contended Lapides' complaint sought recovery under 42 U.S.C. § 1983 and

Title VII of the Civil Rights Act, id. § 2000(e) *et seq*. Georgia did reserve any defenses available to it under state and federal law. See App. 35a. Georgia filed the statutorily-required notice in Cobb County Superior Court, staying further proceedings in state court.

With its Removal Notice filed in federal court, Georgia then sought, on the same day, to dismiss the entirety of Lapides' complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). See App. 37a. The State of Georgia argued that a 12(b)(6) dismissal – a disposition with prejudice – was required on the grounds that "Defendants have Eleventh Amendment immunity." App. 38a.

2. Lapides resisted the removal of the case to federal court and sought remand. After extensive briefing, in which the attorneys for the State of Georgia made certain representations as to their intentions for the litigation, the District Court denied the motion to remand. See App. 15a-17a. The District Court then denied Georgia's Motion to Dismiss on Eleventh Amendment grounds, holding that Georgia had waived its immunity by removing the case to federal court and then seeking a dispositive ruling on the merits. See App. 19a-24a.

Drawing from this Court's decisions in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), and *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998), the District Court concluded that Georgia's litigation conduct amounted to an "unequivocal" waiver of Eleventh Amendment immunity. App. 20a. The District Court found support in decisions from the First, Seventh, Ninth and Tenth Circuits holding that various forms of litigation conduct by state officials – including removal of cases to federal court – constituted a valid waiver, irrespective of the authority of those officials under state constitutions or statutes to waive the Eleventh Amendment bar.

See App. 21, 23a-24a. The District Court also relied upon this Court's precedents that a state's voluntary intervention in a federal case to assert its own claim amounted to a waiver of the Eleventh Amendment. See App. 21 (citing *Clark v. Barnard*, 108 U.S. 436, 447-448 (1883); *Missouri v. Fiske*, 290 U.S. 18, 24-25 (1933); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959)).

Although the District Court denied Georgia's Motion to Dismiss on Eleventh Amendment grounds, it did grant dismissal on Lapides' section 1983 claims against the two named defendants in their personal capacities. The remainder of Georgia's grounds for dismissal were rejected.

3. Georgia took an interlocutory appeal from the District Court's ruling that it had waived its Eleventh Amendment immunity, and the Court of Appeals reversed. App. 1a.

The Court of Appeals recognized that there was a split in Circuit authority on whether a state's litigation conduct constitutes a waiver of the Eleventh Amendment bar. See App. 4a, 9a (indicating that the Tenth Circuit has ruled in the affirmative). The panel nonetheless felt itself constrained by earlier Circuit precedent, *Silver v. Baggiano*, 804 F.2d 1211 (11th Cir. 1986), which required that in order for a state attorney to waive Eleventh Amendment immunity there must be state constitutional or statutory authorization. The Court of Appeals held that, under Georgia's Constitution, no authorization had been granted to Georgia's Attorney General to waive Eleventh Amendment immunity. The panel regarded this as consistent with this Court's holding in *Ford Motor Co. v. Dept. of Treas. of Indiana*, 323 U.S. 459, 467 (1945). See App. 4a-6a.

In the opinion below, the Eleventh Circuit confined this Court's earlier holdings of state waivers through litigation conduct, irrespective of authority under state law, to the

ostensibly unique bankruptcy context of those cases. See App. 7a (distinguishing *Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947); *Gunter v. A. Coast Line R. Co.*, 200 U.S. 273, 284 (1906); *Clark*, 108 U.S. at 447). The panel also chose not to give any weight to Justice Kennedy's concurrence in *Schacht*, 524 U.S. 381, which specifically addressed the propriety of states removing cases to federal court and then asserting an Eleventh Amendment bar. The Eleventh Circuit regarded *Schacht* at least as tangentially validating its ruling that states do not waive Eleventh Amendment immunity, even if they remove cases to federal court. See App. 9a ("While Justice Kennedy's concurrence may provide some insight as to how he, at least, would come out on the issue in the future, we are presently bound by the actual holding of *Schacht*.").

Despite its conclusion, the Court of Appeals appeared perplexed by Georgia's litigation posture in this case. See App. 8a-9a ("[W]e are also troubled by the seemingly inconsistent positions of the State by both asserting that the federal courts have jurisdiction to obtain removal, while simultaneously arguing with equal force that the federal courts do not have authority to hear the claims because of Eleventh Amendment immunity . . . ."); App. 10a-11a & n. 4 ("[T]he State removed to theoretically take advantage of our superior knowledge of the federal questions involved in the case. . . . This is, in fact, what the State argues in its brief for this case. Therefore, we proceed based on their arguments and disregard the possibility that the assertion of sovereign immunity may in fact lead to a situation in which there are no claims over which the federal courts have jurisdiction.").

The Court of Appeals reversed and remanded to the District Court, which was "instructed to hear only those non-barred claims over which it has jurisdiction and remand the others to state court. If no such non-barred federal questions

exist, the whole case is to be remanded to state court." App. 11a. The Court of Appeals did not, however, ascertain whether any of Lapides' claims would survive Georgia's assertion of Eleventh Amendment or other sovereign immunity defenses.

REASONS FOR GRANTING THE PETITION

COURTS ARE DIVIDED ON WHETHER A STATE'S REMOVAL OF A CASE TO FEDERAL COURT WAIVES ITS ELEVENTH AMENDMENT IMMUNITY

1. This Petition invites the Court to settle an issue that has bedeviled its Eleventh Amendment jurisprudence for many years and has now resulted in a profound dissonance in the decisions of the courts of appeals. At issue is whether a state's affirmative litigation conduct in removing a case to federal court constitutes a waiver of that state's Eleventh Amendment immunity. This is so particularly when the state subsequently seeks a dispositive ruling from the federal court, and irrespective of any authority that state's law may confer on the government attorneys who handled the matter. The Court's resolution of this issue would provide needed guidance on whether, or to what extent, states can invoke federal court jurisdiction only to later repudiate that choice. While Petitioner recognizes that states are afforded special treatment under the Eleventh Amendment, they are not exempt from principles of fundamental fairness in the pursuit of their litigation objectives.

This case thus involves a species of waiver contemplated in the Court's seminal Eleventh Amendment decisions and consistently renewed over the course of the past years. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985)

("a State will be deemed to have waived its immunity 'only where stated "by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." ' " Id. (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909))). The kind of waiver implicated here is not, however, one contained in a state statute, nor in the conditionalities of Congressional funding for federal programs and activities, see *South Dakota v. Dole*, 483 U.S. 203 (1987), nor in a state's course of dealing in the marketplace in the now-discredited doctrine of *Parden v. Terminal Railway of the Alabama State Docks Dep't*, 377 U.S. 184 (1964). See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999). Rather, the waiver raised in this case is one resulting from the litigation conduct of states in invoking the jurisdiction of the federal courts, foregoing the immunity otherwise conferred by the Eleventh Amendment.

2. In reaching the conclusion it did, the Eleventh Circuit relied on one strand of this Court's sovereign immunity case law, the principle stated in *Ford Motor Co. v. Dep't of Treas. of the State of Ind.*, 323 U.S. 459 (1945), that any waiver of the Eleventh Amendment bar through litigation "conduct" be authorized under applicable state constitutional or statutory provisions. See id. at 464, 466. Finding no such authorization as a matter of state law, this Court held there was no waiver of immunity where Indiana's Attorney General merely appeared to answer a tax refund suit. Especially important to this Court's ruling in *Ford Motor* was its observation that tax refund suits against states should be heard in state courts. See id. at 470.

The *Ford Motor* Court also recognized that its decision was in tension with a line of cases which held that states waive their Eleventh Amendment immunity when they affirmatively invoke the jurisdiction of the federal courts or otherwise engage

in litigation behavior accepting federal court jurisdiction. See id. at 469 (citing *Gunter v. Atl. Coast Line*, 200 U.S. 273 (1906)). This rule originated in *Clark v. Barnard*, 108 U.S. 436 (1883), holding as an "elemental proposition" that the Eleventh Amendment

> is a personal privilege which [a state] may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction. . . . Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination.

Id. at 447-48. So in *Clark*, Rhode Island's appearance to make a claim in the proceeding — even with a demurrer — constituted a waiver of Eleventh Amendment immunity. See id. at 448. This rule was endorsed in *Gunter*, 200 U.S. at 284 ("[W]here a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment."), and in *Missouri v. Fiske*, 290 U.S. 18, 25 (1933), even though the Court ruled that the state's intervention as a party defendant was too limited in that instance to qualify as a waiver of the Eleventh Amendment bar.

While this Court has never amplified its principle in *Ford Motor* of the necessity of state law authorization for waivers of Eleventh Amendment immunity, it has reaffirmed the rule of *Clark v. Barnard* that certain kinds of litigation conduct engaged in by state attorneys will be deemed a waiver. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), a state's filing a

proof of claim in bankruptcy was held to be waiver. See id. at 573-74; see also *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959) ("a State may waive [Eleventh Amendment immunity] at its pleasure . . . as by a general appearance in litigation in a federal court . . . .") (citation omitted). Indeed, this Court as recently as two years ago sweepingly endorsed the rule in these terms: "*Gardner v. New Jersey* . . . held that a bankruptcy court can entertain a trustee's objections to a claim filed by a State, [and] stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts." *Coll. Sav. Bank*, 527 U.S. at 681 n.3 (citation omitted).

This tension in the Court's jurisprudence of Eleventh Amendment waivers has been observed by lower courts and commentators. See *Hill v. Blind Indus. & Servs. of Maryland*, 179 F.3d 754, 760-63 (9th Cir. 1999); *California Mother Infant Program v. California Dep't of Corrections*, 41 F. Supp.2d 1123, 1127-29 (S.D. Cal. 1999); Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1387 (2001) ("The history of the *Ford Motor Co.* approach . . . is uneven . . ."). And whether the Eleventh Amendment is viewed more as a subject-matter jurisdictional bar, as suggested in *Edelman v. Jordan*, 415 U.S. at 678, or as a waivable "personal privilege," as enunciated in *Clark v. Barnard*, 108 U.S. at 447, still remains to be settled. In any event, the narrow question presented by this Petition — whether a state's removal of a case to federal court is a waiver of any possible objection to federal court jurisdiction — certainly remains open.

Indeed, this Court's recent ruling in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998), appears to have reserved that question for a later day, even as it held that the

presence in an otherwise removable case of a claim barred by the Eleventh Amendment does not destroy removal jurisdiction that would otherwise exist. See id. at 393 ("we have neither reached nor considered the argument that, by giving its express consent to removal of the case from state court, Wisconsin waived its Eleventh Amendment immunity.") (Kennedy, J., concurring). As Justice Kennedy observed in *Schacht*, "these questions should be explored." Id. at 397. The Eleventh Circuit nonetheless appeared to regard *Schacht* as ostensibly ruling that removal does not constitute a waiver, or at least not so clear a holding as to justify a departure from its previous precedent in *Silver v. Baggiano*, 804 F.2d 1211 (11th Cir. 1986).[1] Aside from this issue meriting "explor[ation]," as Justice Kennedy noted in *Schacht*, there is a palpable need to harmonize these discordant aspects of Eleventh Amendment case law, and to develop a uniform rule as to when certain forms of litigation conduct will constitute waivers of states' immunity from federal court jurisdiction.

3. If the issue raised in this Petition was a consequence only of the application of this Court's broad Eleventh Amendment principles, it would still justify plenary review. But the question whether a state's litigation conduct — of which removal of cases to federal court is just one example — can be a waiver of Eleventh Amendment immunity, has now resulted in a clearly-acknowledged division in Circuit authority in numerous cases. See App. 4a, 9a (where the court below indicated that the Tenth Circuit has held that a state's removal of a case constitutes a waiver, irrespective of the authority to waive under state law).

[1] *Silver* was cited by the Court in *Schacht* as among the cases that gave rise to the circuit split that motivated the grant of certiorari in that matter. 524 U.S. at 385-86.

a. On the particular question of whether a state's removal of a case is a waiver, the Eleventh Circuit's position has support from decisions from the Sixth and Seventh Circuits. See *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840, 847 (6th Cir. 1984); *Estate of Porter ex rel. Nelson v. Illinois*, 36 F.3d 684, 691 (7th Cir. 1994). Both these decisions emphasized the question of authority mooted by this Court in *Ford Motor* and concluded that state law had not authorized the state attorneys who had removed the case to actually waive the sovereign's Eleventh Amendment immunity.[2]

On the other side of the ledger, the First and Tenth Circuits have unambiguously held that removal is a waiver, and the decisions of those courts have not sought to analyze the authority of the state Attorney General whose litigation conduct was at issue. In *Newfield House, Inc. v. Mass. Dep't of Public Welfare*, 651 F.2d 32 (1st Cir.), cert. denied, 454 U.S. 1114 (1981), the First Circuit noted that

> the state's actions here seeking removal, arguing in opposition to plaintiff that the Eleventh Amendment did not bar federal jurisdiction over either the case as a whole or pendent claims in particular, . . . and pressing a counterclaim in federal court present a far clearer case of waiver than does a mere appearance.

Id. at 36 n.3 (citations omitted).

If anything, the Tenth Circuit has been even more emphatic in its opinions. In *Gallagher v. Continental Ins. Co.*, 502 F.2d 827 (10th Cir. 1974), that court found a waiver where

[2] Curiously, the Seventh Circuit noted that its decision in *Estate of Porter* contradicted its earlier ruling in *Vargas v. Trainor*, 508 F.2d 485, 492 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975), which had held that Illinois had waived its immunity by removing a case to federal court, irrespective of the authority of the state Attorney General.

Colorado "made a general appearance, joined in the removal petition and the resistance to plaintiffs' remand motion, [and] moved to dismiss for failure to state a claim. . . ." Id. at 830. Likewise, in *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226 (10th Cir. 1999), the Tenth Circuit ruled that Utah had waived its sovereign immunity by removing a case to federal court and then seeking a Rule 12(b)(6) dismissal with prejudice. See id. at 1235. The Tenth Circuit in *Sutton* also observed that this Court's decision in *Schacht* did not reach the question of whether a state categorically waives its immunity by removal. See id. at 1234. Finally, the *Sutton* court held that it simply did not matter that Utah law did not authorize its Attorney General to waive its Eleventh Amendment immunity; his litigation conduct in removing the case and seeking a dispositive ruling was found to be an "extraordinarily effective waiver." Id. at 1235 (quoting *Richins v. Industrial Constr., Inc.*, 502 F.2d 1051, 1056 (10th Cir. 1974)). That a state attorney general can waive Eleventh Amendment immunity by removing a case, irrespective of authority under state law, was reaffirmed by the Tenth Circuit in *McLaughlin v. Board of Trustees of State Colleges of Colorado*, 215 F.3d 1168, 1171-72 (10th Cir. 2000), a decision which primarily relied on Justice Kennedy's concurrence in *Schacht*. See id. at 1171 (quoting 524 U.S. at 397 (Kennedy, J., concurring)).

b. If the division in Circuit authority with the removal cases were not worrisome enough, the schism is replicated with other forms of litigation conduct which can constitute a state's waiver of the Eleventh Amendment bar. See also MOORE'S FEDERAL PRACTICE 3D § 123.41[2] (2000). While the courts of appeals have been understandably reluctant to find a waiver where a state merely appears to answer a complaint in federal court, or files a counter-claim, some have done so. Compare *Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Auth.*, 744

F.2d 880, 886 (1st Cir. 1984), cert. denied, 469 U.S. 1191 (1985) (finding waiver), with *Santee Sioux Tribe of Nebraska v. Nebraska*, 121 F.3d 427, 431 (8th Cir. 1997) (no waiver) and *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385 n.4 (10th Cir. 1997) (same). At the other end of the spectrum, the vast majority of decisions from the courts of appeals have held that where a state files a proof of claim in a federal bankruptcy proceeding that is a conclusive waiver of Eleventh Amendment immunity, notwithstanding any assertion that the state's lawyers lacked authority to waive.[3]

Analytically similar to the waiver-by-removal issue are those cases where states have been found to forego their Eleventh Amendment immunity by participating in federal court litigation to such an extent as to evince a clear intent of waiver. See, e.g., *Hill*, 179 F.3d at 758-60 (state entity "chose to defend on the merits and proceed to trial."); *Hankins v. Finnel*, 964 F.2d 853, 856-58 (8th Cir.) ("Although the State of Missouri never entered a general appearance in this case, it did seek to take advantage of the suit for its own benefit."), cert. denied, 506 U.S. 1013 (1992); *Mitchell v. Comm'n on Adult Entertainment Establishments of the State of Delaware*, 12 F.3d 406, 408-09 (3d Cir. 1993) ("The Commission not only failed

[3] For a representative sampling of cases on this point, see *In re Lazar*, 237 F.3d 967, 976-78 (9th Cir. 2001); *In re Burke*, 146 F.3d 1313, 1318-20 (11th Cir. 1998), cert. denied, 119 S.Ct. 2410 (1999); *In re Platter*, 140 F.3d 676, 679-80 (7th Cir. 1998); *In re 995 Fifth Ave. Asocs.*, 963 F.2d 503, 507 (2d Cir.), cert. denied, 506 U.S. 947 (1992); *WJM, Inc. v. Mass. Dep't of Public Welfare*, 840 F.2d 996, 1002-03 & n.8 (1st Cir. 1988) (all holding waiver). Contra *In re Creative Goldsmiths of Washington, D.C.*, 119 F.3d 1140, 1148-49 (4th Cir. 1997), cert. denied, 523 U.S. 1075 (1998); *Magnolia Venture Capital Corp. v. Prudential Securities, Inc.*, 151 F.3d 439, 443-45 (5th Cir. 1998) (both holding no waiver because of lack of authority by state attorney general).

to appeal the judgment that overruled its eleventh amendment defense, it affirmatively embraced that judgment."); *Garrity v. Sununu*, 752 F.2d 727, 738 (1st Cir. 1984) ("New Hampshire's conduct here reflects 'unequivocal consent' to the jurisdiction of the federal court in this matter. The state has affirmatively complied with most of the court's implementation order — never once objecting on grounds of the eleventh amendment or sovereign immunity."). These decisions stake-out an even broader range of litigation conduct qualifying as an Eleventh Amendment waiver than the removal cases. This wider circle of precedents hold that a state need not itself invoke federal jurisdiction in order to waive the Eleventh Amendment bar, and that acquiescence in the exercise of that jurisdiction can suffice to evince waiver.

4. If any conclusions can be drawn from this fractured picture of precedents it is that states are more likely to have waived their Eleventh Amendment immunity where they have sought to affirmatively invoke federal court jurisdiction (through removal, filing of a proof of claim, or third-party intervention), and then to have sought some benefit by seeking a dispositive ruling (such as a Rule 12(b)(6) dismissal) or collateral advantage from the federal proceeding. See *Sutton*, 173 F.3d at 1235; see also *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (12(b)(6) motion is a request for dispositive ruling). It is, of course, precisely where the state is disappointed in the pursuit of its litigation strategy that it has cause to later regret its conduct, and then to assert the Eleventh Amendment bar.

In these situations, courts of appeals have indicated that it risks fundamental unfairness to allow states to remove cases to federal court, to demand dispositive rulings, and when frustrated that federal judges do not oblige, to *then* seek dismissals based on Eleventh Amendment immunity. See *Newfield House*, 651 F.2d at 36 n.3 ("[Massachusetts'] attempt

now to invoke the Eleventh Amendment would if allowed work a virtual fraud on the federal court and opposing litigants."); *Sutton*, 173 F.3d at 1236 ("The Attorney General's Office having caused the removal to federal court here, and having litigated throughout on the merits here, we feel it would be . . . grossly inequitable to allow assertion of the Eleventh Amendment bar. . . ."). These sentiments were certainly echoed in Justice Kennedy's concurrence in *Schacht*, where he observed that

> [i]n permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. . . . Even if appearing in federal court and defending on the merits is not sufficient to constitute a waiver, a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction.

524 U.S. at 394-95 (Kennedy, J., concurring).

Removal should constitute a unique form of litigation conduct that unambiguously waives a state's objection to federal court jurisdiction under the Eleventh Amendment.[4] This is not to suggest that states may not, when they remove cases, preserve any common-law or statutory sovereign immunities they otherwise possess. But what states are waiving by removal is

[4] One aspect of this categorical form of waiver is the federal statutory basis for removal. See 28 U.S.C. §§ 1441, 1443, 1446; App. 29a-33a. To the extent the Eleventh Circuit's decision casts into doubt the applicability of these statutes in the Eleventh Amendment context, this Petition raises similar issues to those in *Raygor v. Regents of the Univ. of Minnesota*, Docket No. 00-1514 (cert. granted June 4, 2001), reviewing 620 N.W.2d 680 (Minn. 2001) (holding unconstitutional 28 U.S.C. § 1367(d)'s tolling provision in cases where states are parties).

their forum immunity to federal court adjudication of the causes of action contained in the complaint. Where, as here, a state removes a case to federal court and then seeks a dispositive ruling on the merits by filing a Rule 12(b)(6) motion, see App. 38a, it is beyond cavil that the state "voluntarily invokes [the] jurisdiction" of the federal courts, and should not be suffered to later protest that its attorneys lacked the necessary authority to effectuate such a waiver.[5] The authorization requirement of *Ford Motor* should be simply inapplicable where the state removes the cause to federal court.

In granting review, this Court would not be obliged, therefore, to reach the issue of whether the authorization of state officers to waive the Eleventh Amendment bar is subject to some federal law considerations of apparent authority or judicial estoppel, notwithstanding provisions of state constitutional or statutory law to the contrary.[6] Federal jurisdiction should not solely depend on state law formalities. Petitioner would contend, in any event, that there is adequate authority under

[5] This submission is entirely consistent with this Court's ruling in *Schacht*, and a categorical rule of waiver would be vastly superior to the *ad hoc* test propounded by the Eleventh Circuit here, see App. 11a & n.4, which vaguely sought to distinguish barred from non-barred claims, even as Georgia had originally sought to dismiss the entirety of the case from federal court on Eleventh Amendment and other sovereign immunity grounds. See App. 38a.

[6] There is a split in the circuits as to whether statutory language, such as that enacted by Georgia, O.C.G.A. §§ 20-3-36, 45-15-3(6), reprinted App. 5a-6a, constitutes sufficient authorization. The court below ruled in the negative, App. 6a, while the Tenth Circuit in *McLaughlin*, 215 F.3d at 1171, held that Colorado's similar statute was an effective authorization. See also *Candela Corp. v. Regents of the Univ. of Calif.*, 976 F. Supp. 90, 91-92 (D. Mass. 1997).

Georgia statutes for its Attorney General to accept federal court jurisdiction by removal, and thus waive the state's Eleventh Amendment immunity to that extent.

Petitioner believes that the issue raised herein is ready for the "explor[ation]" that Justice Kennedy called for in his concurrence in *Schacht*. See 524 U.S. at 397. The problem of Eleventh Amendment waivers through state litigation conduct has, if anything, proliferated since this Court's decision in *Schacht*, and resolution of the question would demarcate the contours of the Eleventh Amendment bar for practitioners throughout the land.[7] This case squarely presents the question as addressed by the Eleventh Circuit below — and by four other courts of appeals in discordant decisions over the past decade. The matter is ready for the "full briefing and argument, in some later case," as Justice Kennedy envisioned. Id. at 398.

[7] Some commentators are in accord. See, e.g., Laura B. Bartell, *Getting to Waiver - A Legislative Solution to State Sovereign Immunity in Bankruptcy after* Seminole Tribe, 17 BANKR. DEV. J. 17 (2000); Karen Cordry, *Logic, Waiver and Claims: What's Happening with the 11th Amendment?*, 10 AM. BANKR. INST. J. 8 (June 2001); Note, *Reconceptualizing the Role of Constructive Waiver after* Seminole, 112 HARV. L. REV. 1759 (1999); Leah M. Krider, Note, *Removal and Waiver of the Eleventh Amendment*, 74 IND. L.J. 1019 (1999).

CONCLUSION

For the foregoing reasons, the Petition should be GRANTED.

Respectfully submitted,

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[8] Counsel acknowledges the assistance of Ms. Erica Cohen in the preparation of this Petition.

Appendix

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

Paul D. LAPIDES, Plaintiff-Appellee,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, Edwin A. Rugg, Personally and in his capacity as Vice-President of Academic Affairs at Kennesaw State University, et al., Defendants-Appellants.

No. 00-14984
May 24, 2001

Appeal from the United States District Court for the Northern District of Georgia. (No. 00-00953-CV-TWT-1), Thomas W. Thrash, Judge.

Before WILSON and COX, Circuit Judges, and RYSKAMP*, District Judge.

WILSON, Circuit Judge:

The issue is whether a state's removal of a case to federal court constitutes a waiver of Eleventh Amendment immunity. We decide that it does not.

* Honorable Kenneth L. Ryskamp, U.S. District Judge for the Southern District of Florida, sitting by designation.

BACKGROUND

In August 1997, Kennesaw State University began an investigation of one of its professors, Paul Lapides, after a student accused him of sexual harassment. The university investigation produced no corroborating evidence to support the allegation and no action was taken against Lapides. Lapides alleges that as a result of the incident he became aware of letters fabricated by fellow faculty members containing defamatory statements about him and the sexual harassment accusations. He contends that those letters, which were disseminated to others on the faculty, are now part of his personnel file and they have interfered with his eligibility for various faculty positions and promotional opportunities.

Lapides sued the Board and the individual defendants under 42 U.S.C. § 1983 and the Georgia Tort Claims Act, O.C.G.A. § 50-21-23, in the Superior Court of Cobb County, Georgia, alleging that the actions of University officials deprived him of his right to due process of law as well as his liberty and property interests in practicing his profession which are guaranteed to him by the Fourteenth Amendment to the United States Constitution. The Georgia Attorney General filed a notice of removal to the Northern District of Georgia based on the court's original jurisdiction over the federal questions presented by the section 1983 claims. At the same time, he also filed a motion to dismiss the section 1983 claims under Federal Rule of Civil Procedure 12(b)(6) stating, among other reasons, the Board's Eleventh Amendment immunity from suit.

The district court denied the motion and held that the State, through its Attorney General, waived its Eleventh Amendment immunity by removing the case to federal court and invoking the jurisdiction of that court.

DISCUSSION

The Eleventh Amendment to the United States Constitution provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI. It is well established, though not expressly stated in the Constitution, that the Eleventh Amendment also prohibits a state from being sued by its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 20-21, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

Although the Eleventh Amendment bars such suits, the Supreme Court has carved out exceptions. "First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment--an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). Second, a state may consent to suit, but the test for determining whether a state has waived its Eleventh Amendment immunity is a stringent one. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). The United States Supreme Court stated that "a State will be deemed to have waived its immunity 'only where stated "by the most express language or by such an overwhelming implication from the text as [will] leave no room for any other reasonable construction." ' " Id. (quoting *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 53 L.Ed. 742 (1909))) (alteration in original). In fact, in *College Savings Bank*, the Court overruled the

constructive waiver doctrine of *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). 526 U.S. at 680, 119 S.Ct. 1661.[1]

The test to determine whether a state official is authorized to waive the State's Eleventh Amendment immunity is equally stringent. "[A] waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state 'in its Constitution, statutes and decisions.' " *Silver v. Baggiano*, 804 F.2d 1211, 1214 (11th Cir.1986) (quoting *Ford Motor Co. v. Dept. of Treas. of Ind.*, 323 U.S. 459, 467, 65 S.Ct. 347, 89 L.Ed. 389 (1945)). In addition, the Supreme Court, in Ford Motor Co., stated that such authority "is not to be presumed in the absence of clear language to the contrary." 323 U.S. at 468, 65 S.Ct. 347.

Several circuits have addressed the issue of the authority of a state's Attorney General to waive the State's immunity. E.g. *Santee Sioux Tribe of Neb. v. Nebraska*, 121 F.3d 427, 431-32 (8th Cir.1997) (holding that there was no showing that waiver was within the authority of Nebraska's Attorney General); *Dagnall v. Gegenheimer*, 645 F.2d 2, 3 (5th Cir.1981) (holding that the Attorney General of the state of Louisiana had no authority to waive the State's immunity). But cf. *McLaughlin v. Bd. of Trustees of State Colls. of Colo.*, 215 F.3d 1168, 1171 (10th Cir.2000) (holding that the state Attorney General waived the State's immunity). However, we have never considered

[1] The doctrine of constructive waiver permits abrogation of Eleventh Amendment sovereign immunity in cases where the State either: (1) acts as a market participant, i.e. in a manner typically related to wholly-private actors; or (2) performs some act that based on the surrounding circumstances would lead one to believe that the State has intended to waive its immunity. See *Parden*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233; *Coll. Sav. Bank*, 527 U.S. at 682-87, 119 S.Ct. 2219.

whether the Attorney General of Georgia has the authority to waive the State's immunity.

Turning to the text of Georgia's constitution and statutes, we find the following references enlightening as to when immunity is waived. The Georgia Constitution provides:

> The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.
>
> No waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution.

Ga. Const. Art. I, § II, ¶ IX (e)-(f).[2] Therefore, immunity in Georgia may be waived only through statute.

[2] The Georgia Code explicitly reaffirms the applicability of sovereign immunity to the Board of Regents. See O.C.G.A. § 20-3-36. However, with respect to the Georgia Tort Claims Act ("GTCA"), under which Lapides claims partially arise, the Georgia legislature has stated:

> The state waives its sovereign immunity only to the extent and in the manner provided in [the GTCA] and only with respect to actions brought in the courts of the State of Georgia. The State does not waive any immunity with respect to actions brought in the courts of the United States.

O.C.G.A. § 50-21-23(b). Therefore, immunity has been waived to the claims arising under the state tort law.

Section 45-15-3 of the Georgia Code sets forth the duties of the Attorney General. It provides that the Attorney General must "represent the state in all civil actions tried in any court." O.C.G.A. § 45-15-3(6). This is the only section which conceivably could be seen as a grant of authority to the Attorney General to waive immunity. However, it is not an unequivocal expression of authority. In fact, in light of *Ford Motor Company*, the grant of power to the Attorney General to defend suits on behalf of the State is not an express grant of authority to the Attorney General to proceed with the case in any way he deems appropriate; something more is required to constitute a grant of authority to waive immunity, particularly when the State strictly construes the powers of the official. 323 U.S. at 468-69, 65 S.Ct. 347; see also *Walker v. Ga. Ry. & Power Co.*, 146 Ga. 655, 92 S.E. 57, 58 (1917) (stating that "[t]he duties and powers of the attorney-general of this State are limited by the provisions of the Constitution and statutes...."); *Bryant v. State*, 164 Ga.App. 555, 296 S.E.2d 792, 794 (1982) (stating that a state official cannot perform acts not "within the scope of ... statutory and constitutional provisions."). Thus, the Attorney General of the State of Georgia lacked the statutory authority to waive the State's Eleventh Amendment immunity and the legislature has not authorized a waiver of immunity specifically in this context.

Nonetheless, our inquiry does not end there. We have held that an unequivocal expression in the Constitution, statutes, or decisions of the state is not the only way a state can waive its Eleventh Amendment immunity. In *In re Burke*, we stated, "in the absence of explicit consent by state statute or constitutional provision, a state may consent to a federal court's jurisdiction through its affirmative conduct." *In re Burke*, 146 F.3d 1313, 1318 (11th Cir.1998). Yet, this decision was necessarily a narrow one.

In re Burke involved the consideration of two cases in which the Department of Revenue of Georgia filed a proof of claim against debtors. Id. at 1315. Subsequently, the debtors filed an adversary action against Georgia. Id. In bankruptcy proceedings such as this, it is well established that he who invokes the jurisdiction of the bankruptcy court must abide by the consequences of that action. Id. at 1319. In fact, the Supreme Court has held that invoking the jurisdiction of a bankruptcy court can be deemed a waiver of immunity as can the intervention in a proceeding in which the government is not a party. *Gardner v. New Jersey*, 329 U.S. 565, 573-74, 67 S.Ct. 467, 91 L.Ed. 504 (1947) (holding that the state, when it invokes the jurisdiction of the bankruptcy court, must abide by the consequences of that decision and therefore waives its immunity); *Gunter v. A. Coast Line R. Co.*, 200 U.S. 273, 284, 26 S.Ct. 252, 50 L.Ed. 477 (1906) (holding that when a state voluntarily becomes a party to a cause, it cannot assert Eleventh Amendment immunity); *Clark v. Barnard*, 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883) (holding that voluntary intervention constitutes a waiver of immunity).

In our discussion, we indicated the limited application of our holding in *In re Burke*, when we said, "We emphasize that our holding regarding the State's waiver of Eleventh Amendment immunity is quite narrow because the debtors seriously seek to recover only the costs and attorneys' fees incurred in enforcing the bankruptcy court's automatic stay and discharge injunction." 146 F.3d at 1319. Thus, we provided a holding circumscribed by the context of bankruptcy proceedings, in which the State waived its Eleventh Amendment immunity by filing a proof of claim in the bankruptcy proceedings. Id.

The fact that we did not cite *Silver* in our decision in *In re Burke* is also quite telling as to its scope. In *Silver*, we

discussed the authority of the Attorney General of Alabama to waive the State's immunity. 804 F.2d at 1214-15. Though not necessary to the ultimate disposition of the case because the parties conceded that the Attorney General did not possess the authority to waive immunity, we indicated our thoughts on whether removal of the case to federal court constituted a waiver of Eleventh Amendment immunity:

> It might be argued that the Eleventh Amendment immunity was waived by the removal of this case from state court to federal court. However, a waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state "in its Constitution, statues and decisions...." Thus, removal by state officials of a suit containing state law claims to federal court does not amount to waiver of Eleventh Amendment immunity unless those state officials are authorized to waive such immunity.

Id. at 1214 (quoting *Ford Motor Co.*, 323 U.S. at 467, 65 S.Ct. 347) (citation omitted).

We clearly held that a state official must have the authority to waive the State's immunity under the Constitution, statutes, or decisions of the State. As we have already found that the Georgia Attorney General does not possess such authority, that should be the end of the discussion. Yet, Lapides argues that our holding in Silver is inconsistent with In re Burke and with subsequent indications from the Supreme Court as to what it would do in such a case. See *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 393-98, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) (Kennedy, J. concurring). More specifically, he argues, as the district court did, that requesting the jurisdiction of the federal courts is an affirmative act akin to the voluntary intervention into a suit by the State.

While we are also troubled by the seemingly inconsistent

positions of the State by both asserting that the federal courts have jurisdiction to obtain removal, while simultaneously arguing with equal force that the federal courts do not have authority to hear the claims because of Eleventh Amendment immunity, we do not believe that either *In re Burke* or *Schacht* is inconsistent with our pronouncements in *Silver*.[3]

In *Schacht*, Justice Kennedy theorizes in his concurrence that if the issue of state official removal of a case to federal court were to arise, he would not find the holding of *Ford Motor Co.* to be an "insuperable obstacle to adopting a rule of waiver in every case where the State, through its attorneys, consents to removal from the state court to the federal court." Id. at 397. His statements that "a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction," Id. at 395, has been adopted by at least one circuit. See *McLaughlin*, 215 F.3d at 1170-72; *Sutton v. Utah State Sch. for the Deaf and Blind*, 173 F.3d 1226 (10th Cir.1999).

While Justice Kennedy's concurrence may provide some insight as to how he, at least, would come out on the issue in the future, we are presently bound by the actual holding of *Schacht*. In this analogous case, where state officials chose to remove a section 1983 claim to federal court, the Court was confronted with the issue of whether removal was appropriate in a case where the federal court lacked jurisdiction over some of the

[3] "Under our prior precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong." *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc). Moreover, "we are not at liberty to disregard binding case law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." *Fla. League of Professional Lobbyists v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996).

claims based on Eleventh Amendment immunity. Id. at 385. The Justices held that the presence of claims barred by the Eleventh Amendment "does not destroy removal jurisdiction that would otherwise exist." Id. at 386. They then went on to state that the proper action of the district court would be to hear only those claims that are not barred and to remand to state court the other claims. Id. at 392-93. The logic of the Court's opinion does not undercut our holding in *Silver* and in fact supports our holding in this case.

We also find some of the reasoning of *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140 (4th Cir.1997), persuasive on this issue. There, the Fourth Circuit distinguished between defending a suit and filing a proof of claim in a bankruptcy proceeding. Id. at 1149. The Fourth Circuit did not find waiver where the only action by the State in federal court was defense of a suit and no proof of claim was filed. Id. The court reasoned that waiver was necessary with regard to filing a proof of claim because it would be unfair to permit the state to file a proof of claim and, at the same time, allow them to "strip the defendant of valid defenses because they might be construed to be affirmative claims against the state." Id. at 1148. The panel, nonetheless, felt that absent the filing of a proof of claim and the authority of the Maryland Attorney General to waive immunity, such a waiver could not be implied. As such, cases in which the State files a proof of claim are distinguishable from other cases, for it is possible for states to gain an unfair advantage in those cases if they are also allowed to assert their sovereign immunity at the same time. Id.

The present case did not find its way into our courts because of a state initiated cause of action, rather Lapides filed suit and the State removed to theoretically take advantage of our superior knowledge of the federal questions involved in the

case.[4] This coupled with the fact that past cases have held that Eleventh Amendment immunity may be asserted at any point in a case, see *Fla. Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n. 18, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982) (stating that Eleventh Amendment immunity may be asserted for the first time on appeal); *Calderon v. Ashmus*, 523 U.S. 740, 745 n. 2, 118 S.Ct. 1694, 140 L.Ed.2d 970 (1998) (same), and may be raised by a court sua sponte, see *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 524, 525 n. 8, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), we find that our pronouncements in *Silver* stand.[5]

Therefore, we hold that the defendants did not waive their Eleventh Amendment immunity by removal of the case. The district court is instructed to hear only those non-barred claims over which it has jurisdiction and remand the others to state court. If no such non-barred federal questions exist, the whole case is to be remanded to state court.

REVERSED AND REMANDED.

[4] This is, in fact, what the State argues in its brief for this case. Therefore, we proceed based on their arguments and disregard the possibility that the assertion of sovereign immunity may in fact lead to a situation in which there are no claims over which the federal courts have jurisdiction.

[5] In *College Savings Bank*, the Supreme Court held that the voluntariness of waiver is destroyed when the state is forced to choose between refusing to waive immunity and the exclusion from a lawful activity. 527 U.S. at 687, 119 S.Ct. 2219. Therefore, it could be argued, as defendants in this case do, that waiver would be involuntary in a case in which the State is forced to choose between the forum of its choice and immunity. We would be reluctant to base any part of our holding on that ground, however, for it seems that both plaintiff and defendant are mutually excluded from the federal forum in that scenario and thus no strategic or other disadvantage is evident.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PAUL D. LAPIDES, Plaintiff,

CIVIL ACTION FILE

v.

NO. 1:00-CV-953-TWT

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al., Defendants.

ORDER

This case arises under 42 U.S.C. § 1983 alleging violations of due process, in addition to state law tort claims of libel and slander. Before the Court are Defendants' Motion to Dismiss [Doc. 2] and Plaintiff's Motion to Remand [Doc. 7]. For the reasons set forth below, the Court will grant in part and deny in part Defendants' Motion to Dismiss and deny Plaintiff's Motion to Remand.

I. BACKGROUND [1]

Plaintiff Paul D. Lapides is a Professor at Kennesaw State University. The Defendants are the Board of Regents of the University System of Georgia – the state entity responsible

[1] These background statements come from the Plaintiff's Complaint and are taken as true for purposes of these motions.

for Kennesaw State University – and two individual Defendants sued in their official and personal capacities. The individual Defendants are Dr. Edwin A. Rugg and Dr. Teresa J. Covin.[2] Both are supervisors of Mr. Lapides at Kennesaw State University. Dr. Rugg is Vice President for Academic Affairs and Dr. Covin chairs the Department of Management and Entrepreneurship in which Mr. Lapides teaches. Mr. Lapides alleges that the individual Defendants intentionally violated his constitutional right to due process of law by inserting false and misleading statements about him in his personnel file at Kennesaw State University.

Mr. Lapides has been employed as a professor at Kennesaw State University for almost seven years. Mr. Lapides alleges that in August of 1997, he received notice of a student complaint of sexual harassment filed against him. An investigation by the university produced no evidence to corroborate the allegation, and no action was taken against Mr. Lapides. Nevertheless, Mr. Lapides alleges that the investigation and subsequent procedures have defamed him, violated his right to due process of law, and violated his liberty and property interests in practicing his profession. Mr. Lapides alleges that Defendants' placement in his personnel file of allegedly defamatory material impedes his selection for various positions. Mr. Lapides alleges that Dr. Covin fabricated documents and disseminated them to others, including Dr. Rugg. He alleges that Dr. Rugg referenced the allegedly fabricated documents in a letter which is now part of Mr. Lapides' personnel records. As a due process violation, he alleges that Defendants did not timely produce a copy of the sexual harassment complaint as

[2] Plaintiff dismissed without prejudice his claims brought against Dr. Timothy Mescon, individually and in his official capacity as Dean of the Coles College of Business at Kennesaw State University. [Doc. 1, Exh. G].

required by university policy. Mr. Lapides also alleges that he was not allowed to respond to the allegations in the harassment complaint. Additionally, he alleges that he has received unspecified threats. Mr. Lapides also alleges that Defendants improperly failed to promote him or raise his salary, and that he has been subjected to a hostile work environment. He also alleges to have suffered from an intentional infliction of emotional distress. Finally, Mr. Lapides stated in his Complaint his intent to file a complaint with the EEOC for religious and gender discrimination and retaliation.

Mr. Lapides filed this case on March 9, 2000 in the Superior Court of Cobb County, Georgia. On April 13, 2000, Defendants filed their Answer. Within their Answer, the Defendants asserted the defense of Eleventh Amendment immunity from suit in federal court. Defendants filed contemporaneously with their Answer a Notice of Removal to this Court. Also on April 13, 2000, Defendants filed a Motion to Dismiss in this Court, largely on Eleventh Amendment grounds.

II. STANDARD OF REVIEW

A complaint should be dismissed under Rule 12(b)(6) only where it appears beyond doubt that no set of facts could support the plaintiffs claims for relief. Fed.R.Civ.P. 12(b)(6); *see Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construes them in the light most favorable to the plaintiff. *See Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983). Notice pleading is all that is required for a valid complaint. *See*

Lombard's Inc. v. Prince Mfg., Inc., 753 F.2d 974, 975 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986). Under notice pleading, plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *Id.*

III. DISCUSSION

A. MOTION TO REMAND

Mr. Lapides moves this Court to remand this case to the Superior Court of Cobb County, Georgia pursuant to 28 U.S.C. §1447(c). Mr. Lapides alleges first that Defendants waived their right to remove this case to federal court by filing an answer in state court. Second, Mr. Lapides alleges that Defendants waived their right to remove by claiming Eleventh Amendment immunity. Third, Mr. Lapides argues that it was improper for the Defendants to remove a case in which they contend all claims are barred from consideration by a federal court. As noted above, this case was filed in the Superior Court of Cobb County on March 9, 2000. Under Georgia law, Defendants had 30 days after the service of process to file their answer. *See* O.C.G.A. § 9-11-12. On the 30th day, Defendants filed in state court both their answer and notice of removal. It is undisputed that Defendants were not required to file the answer in state court because filing the notice of removal immediately stayed further action in the state court. Defendants took no other action in state court and did not include any counterclaims in their answer. Mr. Lapides contends that filing the answer when not required by state law constitutes a waiver of Defendants' right to remove.

Mr. Lapides fails to cite any case which supports his argument that the mere filing of an answer in state court waives a defendant's right to remove a case to federal court. The Eleventh Circuit has not addressed the issue. Other Circuit

Courts of Appeal, as well as several district courts in this circuit, however, have addressed the issue. Generally, these courts have held that the mere filing of a responsive pleading in state court, without more, does not constitute a waiver of a defendant's right to remove. *See Beighley v. Federal Deposit Ins. Corp.*, 868 F.2d 776, 782 (5th Cir. 1989) (holding the "right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits."); *Haynes v. Gasoline Marketers, Inc.*, 184 F.R.D. 414 (M.D. Ala. 1999); *Hill v. State Farm Mut. Auto, Ins. Co.*, 72 F. Supp.2d 1353 (1999) (holding that filing a motion to dismiss in state court did not waive right to remove to federal court); *Estevez-Gonzalez v. Kraft, Inc.*, 606 F. Supp. 127 (S.D. Fla. 1985). Commentators agree with this approach: "A waiver of the statutory right to remove a case from a state to a federal court must be clear and unequivocal." Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction 3d, §3721. This Court agrees. Defendants' filing of their answer in state court on the same day they filed their notice of removal does not construe a clear and unequivocal indication of their intent to waive their right to removal. To the contrary, filing a notice of removal indicates their intent to exercise their right to remove.

Mr. Lapides' remaining arguments for remand merit only brief discussion. As a second ground for remanding, Mr. Lapides argues that the Defendants waived their right to remove by raising their Eleventh Amendment immunity in state court. As with his first argument, Mr. Lapides fails to cite any case supporting his contention that mentioning the Eleventh Amendment in a state court answer bars a defendant from removing a case to federal court. This argument is without merit. Rather than indicating a clear and unequivocal intent *to waive* their right to remove, Defendants' inclusion of the Eleventh Amendment defense in their answer demonstrates an

intention *to remove* because the Eleventh Amendment does not apply to state court proceedings. As a third argument, Mr. Lapides argues that it was improper for the Defendants to remove the case to a court which they contend is barred by the Eleventh Amendment from considering the case. Again, Mr. Lapides cites no authority for the proposition that raising an Eleventh Amendment immunity defense against some claims destroys a defendant's right to remove the whole case. Moreover, Mr. Lapides' argument ignores his claims against the individual defendants in their personal capacities. These claims are not barred by the Eleventh Amendment, and Defendants do not seek to raise an Eleventh Amendment defense with respect to these claims. Furthermore, the Supreme Court has stated that federal courts have jurisdiction to hear a removable case, even though some of the claims in the case may be barred by the Eleventh Amendment. *See Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998). Accordingly, Mr. Lapides' Motion to Remand is denied.

B. MOTION TO DISMISS

Defendants make six arguments for dismissing various claims from the Complaint. First, Defendants argue that the Court lacks subject matter jurisdiction to hear Mr. Lapides' Title VII claim because he has not filed his claim within 90 days of receipt of his "'right to sue" letter. Second, Defendants argue that the federal claims against the State, i.e. the Board of Regents and the individual defendants in their official capacities, are barred by the Eleventh Amendment. Third, and related to their second argument, Defendants argue that the state tort claims against the State must also be dismissed or severed and remanded because the State has not waived its Eleventh Amendment immunity from suit in federal court. Fourth,

Defendants argue that the § 1983 claims against Drs. Rugg and Covin are barred by qualified immunity. Fifth, Defendants argue that § 1983 will not support a claim based on vicarious liability. Finally, Defendants argue that Mr. Lapides has not stated a claim for violation of due process.

1. TITLE VII CLAIM.

Defendants' first argument is without merit. Defendants argue that Mr. Lapides has failed to meet the jurisdictional prerequisite of filing a Title VII claim within 90 days of receiving his right to sue letter from the EEOC. Mr. Lapides, however, has not yet brought a Title VII claim against the Defendants. The Complaint expressly states that Mr. Lapides has only filed a complaint with the EEOC, and stated his intent to add a Title VII claim at the appropriate time. [Doc. 1, Exh. A., ¶ 27]. This situation is distinguishable from the case on which Defendants rely. In *Perimeter Lighting Inc. v. Karlton*, 456 F. Supp. 355 (N.D. Ga. 1978), the plaintiff initiated its action not by filing suit but by presenting a motion for a preliminary injunction to the state court. On consideration, the judge signed an order enjoining the defendant from denying plaintiff access to leased lighting fixtures. When the judge signed the order, the complaint had not been filed with the clerk of the state court. At the hearing on the preliminary injunction, however, both the judge and counsel for the defendant were provided with a copy of the complaint in the case. A second complaint with different parties was then filed in the state court on the same day the defendant removed the case to federal court. United States District Judge O'Kelley allowed the removal because the "initial pleading" constituted a clear statement of the entire case which allowed the defendant to examine the basis for the action. *Id.*, at 358. No claims were raised in the complaint

that were not present in the initial pleading, i.e., the motion for a preliminary injunction, although new parties were named in the second complaint. Here, there has been no initial pleading for the Title VII claim. The pleading filed by Mr. Lapides only expresses his intention to later file a Title VII claim. Consequently, a clear statement of any Title VII claim does not exist. Thus, the motion to dismiss will be denied as to the purported Title VII claim.

2. ELEVENTH AMENDMENT IMMUNITY.

Defendants next argue that the Eleventh Amendment[3] bars Mr. Lapides' federal and state claims against the State. The Eleventh Amendment bars suit against a state or one of its agencies, departments or officials when the state is the real party in interest or when any monetary recovery would be paid from state funds. *See Wisconsin Dept. of Corrections*, 524 U.S. at 389; *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Despite its express language, the Supreme Court has construed the Eleventh Amendment jurisdictional bar to extend to federal suits against a non-consenting state "by her own citizens as well as citizens of another state." *Port Auth.Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990) (*quoting Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)). Eleventh Amendment immunity can only be overcome through a waiver by the state or a valid congressional override. *See Wisconsin Dept. of Corrections*, 524 U.S. at 389. Neither party contends that

[3] The Eleventh Amendment provides: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

Congress has abrogated the State's immunity in this case. Mr. Lapides, however, argues that the State has waived its Eleventh Amendment immunity by removing the case to federal court.

As a preliminary matter, it is undisputed that the State can waive its Eleventh Amendment defense.[4] *Wisconsin Dept. of Corrections*, 524 U.S. at 389 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)). A waiver must be unequivocal to be valid. "In the absence of an unequivocal waiver specifically applicable to federal-court jurisdiction, we decline to find that [the State] has waived its constitutional immunity." *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 241. Thus, the question before the Court is whether the State's act of removing a case to federal court constitutes an "unequivocal wavier" of its Eleventh Amendment immunity for a particular claim.[5] The Eleventh Circuit has not yet addressed the issue. Several other circuits, however, have held that when a state voluntarily invokes the jurisdiction of the federal court, the state cannot later complain that it does not want to be in federal court

[4] It is important to note that a state can create a limited waiver of its Eleventh Amendment immunity by consenting to suit in its own state courts without waiving its Eleventh Amendment immunity from suit in federal courts. *See Port Authority Trans-Hudson Corp.*, 495 U.S. at 305. Thus, a state may waive its common law sovereign immunity under state law, without waiving its Eleventh Amendment immunity under federal law. These two concepts of immunity are distinct. "Each ultimately rests upon separate, albeit related, footing--common law sovereign immunity is determined by state law and Eleventh Amendment immunity is determined under federal standards." *In re Allied-Signal, Inc.*, 919 F.2d 277, 281 (1990); see also Wright & Miller, Federal Practice and Procedure, § 3524 at pp. 213-14.

[5] The Supreme Court has recently written that "[a] federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 121.

after all. *See Sutton v. Utah State Sch. For the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999) (holding that the state, by removing the case to federal court, unequivocally waived its immunity); *Hill v. Blind Indus. and Serv. of Maryland*, 179 F.3d 754 (9th Cir. 1999) (holding that the state defendant waived its Eleventh Amendment immunity by waiting until trial to assert it); *Dekalb County Div. of Family and Children Svcs. v. Platter (In re Platter)*, 140 F.3d 676, 680 (7th Cir. 1998) (holding that when a state voluntarily enters the federal forum by filing a claim, "it cannot run back to seek Eleventh Amendment protection when it does not like the result"); *Newfield House, Inc. v. Massachusetts Dept of Pub. Welfare*, 651 F.2d 32, 36 n.3 (11th Cir. 1981) (holding that state waived immunity by removing case to federal court). This Court concurs with the reasoning of these courts. Where a state facing suit in a state court purposefully seeks a federal forum, an unequivocal intent to waive immunity is clear. *See Sutton*, 173 F.3d at 1234.

Further support for this conclusion appears in early cases holding that a State's voluntary intervention in a federal case to assert its own claim amounted to a waiver of the Eleventh Amendment. *Clark v. Barnard*, 108 U.S. 436, 447-448 (1883); *Employees of Dept. of Public Health and Welfare of Mo. v. Dept. of Public Health and Welfare of Mo.*, 411 U.S. 279, 294, n. 10 (1973) (Marshall, J., concurring in result) (citing *Clark v. Barnard* with approval); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 276 (1959) (same); *Missouri v. Fiske*, 290 U.S. 18, 24-25 (1933) (same). Waiver has also been found when a state voluntarily files a claim against a fund that is under the federal court's jurisdiction, such as a bankruptcy case. *See Georgia Dept. of Revenue v. Burke (In re Burke)*, 146 F.3d 1313, 1319-20 (11th Cir. 1998) (holding that by filing proofs of claim in bankruptcy case, state waived immunity and became subject to liability for violation of automatic stay and

enforcement of discharge injunction), cert. denied, --- U.S. ---, 119 S.Ct. 2410, 144 L.Ed.2d 808 (1999); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947).

In a recent concurrence, Justice Kennedy indicated his opinion that removal waives a state's Eleventh Amendment immunity. In *Wisconsin Dept. of Corrections*, *supra*, the State consented to removal but then raised an Eleventh Amendment objection to the jurisdiction of the United States District Court over the claim against it. *Id.* Justice Kennedy noted that "[t]his is the situation in which law usually says a party must accept the consequences of its own acts." *Id.* A simple rule would hold that once a state consents to removal, it waives its Eleventh Amendment immunity for that case. The rub in this appealingly simple logic appears in the great latitude afforded the states in raising the immunity. As Justice Kennedy pointed out, the Eleventh Amendment bar may be asserted for the first time on appeal when a state is initially sued in federal court. *Id.* Thus, a state sued in federal court does not waive its immunity by appearing and defending on the merits.

The situation before this Court is different. The distinction, in this Court's opinion, justifies adopting the clear and unequivocal rule. As Justice Kennedy wrote, "[e]ven if appearing in federal court and defending on the merits is not sufficient to constitute a waiver, a different case may be presented when a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction." *Id.* at 395. Here, Mr. Lapides chose to sue the State of Georgia in state court. The State then directly invoked the jurisdiction of the United States District Court while simultaneously claiming immunity from the District Court's jurisdiction. Sanctioning this action would be fundamentally unfair. It would allow the state to avoid being sued anywhere in spite of its limited waiver of sovereign inununity; or it could first litigate on the merits but then assert

its immunity if it lost, thus allowing the state to raise offensively the defensive shield of Eleventh Amendment immunity.

The state should decide if it wants federal jurisdiction or not. "Since a state which is made a defendant to a state-court action is under no compulsion to appear in federal court and, like any other defendant, has the unilateral right to block removal of the case, any appearance the state makes in federal court may well be regarded as voluntary in the same manner as the appearances which gave rise to the waivers in *Clark* and *Gardner*." *Wisconsin Dept. of Corrections*, 524 U.S. at 395-96 (Kennedy, J., concurring); but see *Watkins v. California Dept. of Corrections*, 100 F. Supp.2d 1227 (finding that the state did not waive immunity from suit by removing action). "[W]here a state voluntarily becomes a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment." *Gunter v. Atlantic Coast Line R.Co.*, 200 U.S. 273, 284 (1906). The Court is persuaded by Justice Kennedy's reasoning that states waive their Eleventh Amendment immunity in a particular case by directly involving the jurisdiction of the federal courts.

The Court also believes that the Attorney General, as the State's counsel in this case, has the authority to waive the state's Eleventh Amendment immunity by and through his representation of the State irrespective of any express grant of authority to do so. *See McLaughlin v. Board of Trustees of State Colleges of Colorado*, 215 F.3d 1168,1170 (10th Cir. 2000). Justice Kennedy also addressed this issue: whether a waiver can be found in the absence of a state law expressly authorizing the state's attorney to waive the Eleventh Amendment on its behalf. He wrote that

> the absence of specific authorization...is not an insuperable obstacle to adopting a rule of waiver in

> every case where the state, through its attorneys, consents to removal from the state court to the federal court. If the states know or have reason to expect that removal will constitute a waiver, then it is easy enough to presume that an attorney authorized to represent the state can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal.

Schacht, 524 U.S. at 397. Therefore, Defendants' Motion to Dismiss the federal claims against the State on Eleventh Amendment grounds will be denied. The motion will also be denied as to the state tort claims against the State.

3. 42 U.S.C. § 1983 AND DUE PROCESS

In addition to the Eleventh Amendment, Defendants raise other arguments against Mr. Lapides' § 1983 claims. He alleges Defendants violated his rights to due process of law. With regard to these claims, the Defendants raise the defense of qualified immunity. A proper analysis of the claims against Drs. Rugg and Covin requires an understanding of the distinction between official-capacity actions and personal-capacity actions, sometimes referred to as individual-capacity actions. Personal-capacity suits seek to impose personal liability upon a government official for actions taken under color of state law. *Kentucky v. Graham*, 473 U.S. 159,165-167 (1985). Official-capacity suits differ in that the real party in interest is the entity as long as the government entity receives notice and an opportunity to respond. *Yeldell v. Cooper Green-Hosp.*, 956 F.2d 1056, 1060 (11th Cir. 1992). "Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on damages judgment in an official-capacity suit must look to the government entity itself." *Kentucky*, 473

U.S. at 165-167.

On the merits, to establish personal liability in a § 1983 suit, one must show only that the official, acting under color of state law, caused the deprivation of a federal right. *Id.* An official capacity action requires more. "[A] governmental entity is liable under § 1983 only when the entity itself is a 'moving force' behind the deprivation. Thus, in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law." *Id. See also Yeldell*, 956 F.2d. 1056. Considering defenses to liability, "an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law." *Id.* These defenses are unavailable in an official capacity suit. *Id.* Only sovereign immunity can be claimed in an official capacity action "that the entity, *qua* entity, may possess, such as the Eleventh Amendment." *Id.*

The Court will first discuss the personal capacity claims against Drs. Rugg and Covin. These individual Defendants, in their personal capacities, are entitled to qualified immunity if the law with respect to their actions was unclear at the time the cause of action arose. *Clark v. Evans*, 840 F.2d 876, 879 (11th Cir. 1988). "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known... If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1983). The existence of Supreme Court cases or cases from this circuit recognizing a right helps determine whether the right is clearly established to a reasonably competent official. *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993).

Mr. Lapides alleges that Drs. Rugg and Covin caused improper and defamatory material to be filed in his personnel record. He alleges that their conduct was "libelous, slanderous and defamatory" in statements and writings. [Doc. 1, Exh. A, Complaint ¶ 1]. As to Dr. Covin specifically, the department chair, Mr. Lapides alleges that Covin fabricated defamatory documents concerning Mr. Lapides and disseminated them to others, including Dr. Rugg. As for Dr. Rugg, the Vice President of Academic Affairs, Mr. Lapides alleges Rugg referenced the false allegations in his letter to Mr. Lapides "after [Rugg] knew or should have known of its origins." [Complaint, ¶ 11]. Mr. Lapides alleges that Dr. Rugg placed the letter and alleged libelous documents in Mr. Lapides' personnel records at Kennesaw State University. Mr. Lapides also alleges that Drs. Rugg and/or Covin disseminated "defamatory statements to others within the academic community who had no right to receive such information..." [Complaint, ¶ 13]. He alleges that both Drs. Rugg and Covin acted intentionally and willfully to harm him. Accepting these allegations as being true, the Plaintiff has not shown a violation of a clearly established constitutional right. It is unconstitutional for a state to defame a citizen without providing proper procedural due process. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). The Eleventh Circuit has also held that the placement of "stigmatizing information placed into the public record by a state entity, pursuant to a state statute or otherwise, constitutes sufficient publication to implicate the liberty interest under the due process clause of the Fourteenth Amendment to the United States Constitution." *Buxton v. City of Plant City, Florida*, 871 F.2d 1037, 1046 (11th Cir.1989). Contrary to Plaintiff's argument, that does not end the inquiry. Although Plaintiff's liberty interest may have been clearly established, Plaintiff must show that it was clearly established that he was entitled to more

protection of that interest than he received. In this case, after an investigation, the original complaint of sexual harassment was resolved in favor of Mr. Lapides. Thereafter, references to the complaint were made in response to the various complaints and grievances made by Mr. Lapides. Plaintiff has not cited any case clearly holding that university officials violate a professor's constitutional rights by investigating a complaint of sexual harassment and doing nothing further in terms of formal or informal hearings after resolving it in favor of the professor. The Plaintiff may not rely upon legal truisms. "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993). There is no such bright line case law in this case. Therefore, Defendants' Motion to Dismiss is granted as to the § 1983 claims against Drs. Rugg and Covin in their personal capacities.

The official capacity claims against Drs. Rugg and Covin will be addressed within the § 1983 claim against the State. Suits brought under § 1983 against individuals in their official capacities are equivalent to bringing suit against the entity. *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991) (*citing Kentucky v. Graham*, 473 U.S. 159, 165 (1985)). Defendants did not discuss in their brief the § 1983 claims against the State. "[A] governmental entity is liable under § 1983 only when the entity itself is a 'moving force' behind the deprivation. Thus, in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law." *Id*; *See also Yeldell*, 956 F.2d 1056. At this point, the Court cannot say as a matter of law that Mr. Lapides could prove no set of facts by which to establish an unconstitutional policy or custom by the Board of Regents through Kennesaw State University. Accordingly, Defendants' Motion to Dismiss shall be denied as to the § 1983 claims against the State, i.e. the

Board of Regents and against Drs. Rugg and Covin in their official capacities. The Court will not address Defendants' arguments regarding vicarious liability under § 1983 as Mr. Lapides does not base his claim on that theory of recovery.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss [Doc. 2] is hereby GRANTED IN PART AND DENIED IN PART. Plaintiff's Motion to Remand [Doc. 7] is hereby DENIED.

SO ORDERED, this 8 day of September, 2000.

THOMAS W. THRASH, JR.
United States District Judge

UNITED STATES CODE ANNOTATED
TITLE 28.
JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 89--DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its

discretion, may remand all matters in which State law predominates.

. . . .

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

UNITED STATES CODE ANNOTATED

TITLE 28.

JUDICIARY AND JUDICIAL PROCEDURE

PART IV--JURISDICTION AND VENUE

CHAPTER 89--DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

UNITED STATES CODE ANNOTATED

TITLE 28.

JUDICIARY AND JUDICIAL PROCEDURE

PART IV--JURISDICTION AND VENUE

CHAPTER 89--DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper

from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

. . . .

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

. . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO.
1-00-CV-0953

PAUL D. LAPIDES, Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Coles College of Business at Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University Defendants.

NOTICE OF REMOVAL

To: The Judges of the United States District Court for the Northern District of Georgia, Atlanta Division

COME NOW Defendants in the above-styled matter and pursuant to 28 U.S.C. §§ 1441 and 1446, and within the time prescribed by law, file this Notice of Removal. The Defendants

file this notice subject to and without waiving any defenses available to the Defendants under state and federal law. The Defendants respectfully show the following:

1.

Plaintiff, Paul D. Lapides, has brought a civil action against the Defendants named above in the Superior Court of Cobb County, said action being designated as Paul D. Lapides v. Board of Regents of the University System of Georgia, et al., Civil Action No. 00-1-01880-24. Plaintiff seeks to recover damages from the Defendants pursuant to 42 U.S.C. § 1983 for alleged violations of the Plaintiff's Civil Rights under the United States Constitution and under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e), et seq.)

2.

This action is a civil action brought pursuant to 42 U.S.C. § 1983 and under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e), et seq.). Plaintiff's causes of action present federal questions over which this Court has original subject matter jurisdiction under the provisions of 28 U.S.C. § 1331, and, accordingly, is one which may be removed to this Court pursuant to the provisions of 28 U.S.C. § 1441(b) and 1443. The Defendants attach hereto a copy of the Complaint filed in the Superior Court of Cobb County, Georgia, on or about March 9, 2000 (Exhibit "A").

. . . .

WHEREFORE, The Defendants move that this Notice of Removal be filed, and that said action be removed to and proceed in this Court, and that no further proceedings be had in

in the Superior Court of Cobb County, State of Georgia.

This 13 day of April, 2000.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

__/s/_____
LORETTA L. PINKSTON 580385
Senior Assistant Attorney General

__/s/_____
DEVON ORLAND 554301
Assistant Attorney General

__/s/_____
RALPH W. ELLIS 295840
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO.
1-00-CV-0953

PAUL D. LAPIDES, Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; EDWIN A RUGG, personally and in his capacity as Vice-President for Academic Affairs at Kennesaw State University; TIMOTHY MESCON, individually and in his capacity as Dean of Coles College of Business at Kennesaw State University; and TERESA J. COVIN, a/k/a TERESA JOYCE, individually and in her capacity as Chair of the Department of Management & Entrepreneurship at Kennesaw State University Defendants.

DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

COME NOW Defendants, Board of Regents of the University System of Georgia, Edwin A. Rugg, Timothy Mescon, and Teresa J. Covin, and within the time permitted by

law, make and file this Motion to Dismiss pursuant to Federal Rules 12(b)(1) and 12(b)(6). This Court lacks subject matter jurisdiction on this action based on the following: (1) Plaintiffs' Title VII claims are barred because the Plaintiff has failed to establish that Plaintiff received a "right to sue" letter from the Equal Employment Opportunity Commission and filed this action within ninety days of that receipt.

Defendants further move that the Court dismiss Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that:

(1) Plaintiff has failed to state a claim for which relief can be granted.

(2) Defendants have Eleventh Amendment immunity from suit.

(3) Defendants have qualified immunity.

(3) [sic] Defendants are protected by sovereign immunity.

For these reasons, Defendants respectfully request that Plaintiff's Complaint be dismissed in its entirety.

This 13 day of April, 2000.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

__/s/_____
LORETTA L. PINKSTON 580385
Senior Assistant Attorney General

__/s/_____
DEVON ORLAND 554301
Assistant Attorney General

__/s/_____
RALPH W. ELLIS 295840
Assistant Attorney General